No. 97-1121

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, et al.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

MEMORANDUM OF THE PETITIONER IN OPPOSITION TO MOTION OF THE STATE OF OHIO TO PARTICIPATE IN ORAL ARGUMENT AND FOR DIVIDED AND EXPANDED ARGUMENT

At issue in this case is the constitutionality of the anti-gang loitering ordinance enacted by petitioner City of Chicago. The State of Ohio, joined by 32 other States and Territories, has filed a brief as amicus curiae in support of the petitioner pursuant to this Court's Rule 28.3, 28.4, and 28.7. Ohio now seeks additional time for oral argument and divided argument so that it may present argument as an amicus curiae. Petitioner opposes this request.

1. The interest of the State of Ohio and the other amici States and Territories is a limited one, and not one that justifies granting amici argument time, especially if this will reduce the time for argument available to petitioner. The Office of the Attorney General of Ohio does not claim that it has experience in enforcing any loitering or similar public order

law. Rather, public order laws are typically enforced locally, through local district attorneys or prosecutors, such as the office that represents the petitioner. Indeed, in their brief, amici do not claim to have experience with enforcement of any ordinance similar to the anti-gang loitering ordinance at issue here. In the statement of interest that introduces their brief, amici instead assert only that they "share Chicago's concerns about urban violence and community disfunction spawned by criminal gangs and share responsibility with their political subdivisions for rooting out these problems." Ohio Br. 1. In fact, amici acknowledge that they generally have responded to gang crime with a different approach, by enacting sentencing enhancement laws that have "targeted gang crimes for additional penalties." Id. at 3. And they also acknowledge that Chicago's approach is different from theirs: "in contrast to these other laws, the Chicago ordinance takes a more proactive stance toward law enforcement." Id. at 4. Amici add: "Instead of predictably increasing the sentences imposed for gang-related crimes, instead of building still-larger prisons to house the youths responsible for these actions, Chicago has tried to alter the community climate that allows gang activity to fester." Ibid.

2. The motion, for its part, attempts to justify participation in oral argument on the basis of what Ohio terms "the impact of this litigation on a broad range of State laws." Motion at 2. With all due respect to Ohio, these questions are of secondary import in this litigation. While the Court will

rightly be concerned with the effect of its decision in this case on other laws, any such impact will not be immediate enough to justify argument time in this case. As we explain above, neither the State of Ohio nor any other of the amici States and Territories administers a public order law similar to the City's ordinance. Of course, amici are interested in this case -- both for what it represents as an emerging crime control device and because some of the broadest arguments respondents have made could reach the various state laws that amici do administer. Yet given the differences between the ordinance and the state laws, the effect of any decision adverse to petitioner on state laws administered by amici is highly speculative, and in any event will be settled in future litigation, not in this case.

3. This indirect effect that a decision in this case is likely to have on the laws amici administer easily distinguishes the three cases Ohio cites to justify divided argument in this case. In City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the Court considered the constitutionality of the Religious Freedom Restoration Act of 1993. In that case Ohio was permitted to argue that the Act was unconstitutional because the Act, in addition to constraining the powers of local governments, on its face also applied to and constrained the powers of the States, and thus, as Ohio claimed in its statement of interest, regardless of its constitutionality as applied to local governments, "disrupt[ed] several core functions of State government." The Court allowed a motion by the State of Ohio and

also granted the Solicitor General's motion for divided argument on the other side of the case. See 117 S. Ct. 762 (1997). Here, of course, the claims at issue do not directly implicate the administration of state laws, and in any event, Ohio raises no separate issue in this case regarding the scope of state as opposed to local police powers. Moreover, the Solicitor General does not present a contrary view here, but rather also supports the City of Chicago.

Edgar v. MITE Corp., 457 U.S. 624 (1982), involved the validity of a provision of Illinois' Business Takeover Act that required a tender offeror to notify the Secretary of State and the target company of its intent to make a tender offer and the material terms of the offer 20 business days before the offer becomes effective. See id. at 634-35. As the Court's opinion notes, takeover statutes were in effect in 37 States. See id. 631 n.6. Thus in that case as well the claims at issue directly affected the administration of state laws. New York, which stressed in its amicus brief its "significant interest in the issues presented by this appeal since the decision of this Court may affect the validity of" various New York laws, also noted that its statute was different in some crucial respects from Illinois', and on this basis was allowed to argument orally. And again, the Court also allowed time to the Solicitor General to argue orally against the state law. Thus, in that case, like City of Boerne v. Flores, the case at issue directly affected the laws of many states, and the amicus presented a different set of

arguments from the party.

Finally, in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1972), the Court considered whether Burbank's ordinance prohibiting overnight take off and landing at the city airport was preempted. Of course, perhaps the first thing to say about this case is that it was argued long enough ago that it reflects a markedly differently attitude by the Court toward divided argument than the Court now appears to hold. In fact, the Court allowed both the State of California and the Solicitor General time to argue in support of appellants. In any event, California was allowed argument time on the basis of an amicus brief that identified a state policy against noise pollution that was furthered by ordinances such as Burbank's, as well as a comprehensive state regulatory plan for noise pollution that "we would not like to see upset by a decision which on its face is directed at one municipal ordinance." Ohio and Chicago, of course, have no similar relationship, and the gang loitering ordinance does not directly further any interest or policy of Ohio.

4. Ohio does not appear to ask for a portion of argument time that would otherwise be allocated to Chicago, but only for 10 additional minutes in which to present argument. Any allocation to Ohio of a portion of our time should, in any event, not be allowed. Reducing the time available to us for argument would seriously prejudice the petitioner without advancing any interest of the Court's in a full presentation of the issues. We

say this for two reasons.

First, this case presents a multitude of complex constitutional issues. There are two sets of respondents, represented by separate counsel, who we are informed intend to file separate briefs on the merits. It will accordingly be difficult for petitioner to address all of the issues raised by this case if we are deprived of a substantial portion of its argument time. Counsel for Ohio cannot fill this gap because, as we explain above, he has little relevant experience in the enforcement of this or similar public order laws. In fact, in their brief, amici takes no position on a number of the grounds that respondents have advanced to attack the constitutionality of the ordinance at issue.

Second, as we note above, the state laws that amici appear in this Court to defend take a markedly different approach from our ordinance. The issues that bear directly on amici will therefore not likely be raised at argument. For that reason, neither the brief nor the motion gives any basis for thinking that an oral presentation by Ohio will assist the Court.

5. Counsel of record for the petitioner should be able to present the case to this Court without need of divided argument. Counsel is experienced in practice before this Court, having argued twice previously and having clerked for a Member of this Court. The motion, in fact does not identify any deficiency in counsel for petitioner or any reason why we would be unable to explain the impact of the litigation on the various state laws.

Given our abilities, on the one hand, and the limited familiarity of counsel for amici with enforcement of this type of law on the other, there is little reason to believe that divided argument would add a unique and valuable perspective that would not otherwise be available to the Court.

For all of these reasons, the petitioner respectfully requests that the motion of the amicus State of Ohio to participate in oral argument and for divided and expanded argument be denied.

Respectfully submitted,

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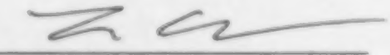
By: 
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CERTIFICATE OF SERVICE

I certify that I served all parties required to be served with the Memorandum of the Petitioner in Opposition to Motion of Ohio for Divided Argument by placing a copy of the memorandum in envelopes addressed to each of the persons listed on the attached service list, affixing proper postage, and depositing those envelopes in the United States mail on July 8, 1998.

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